SUPREME COURT, U. S.
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No. 149

IN THE

# Supreme Court of the United States

October Term, 1967

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WAYNE DYKE, ED MCKINNEY AND JOHN BLACKWELL,
*Petitioners,*

v.

TAYLOR IMPLEMENT MANUFACTURING COMPANY, INC.,
*Respondent.*

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## ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

Respondent's brief makes a number of assertations regarding the "search and seizure" issue which we believe warrant reply. In addition, respondent contends that the "jury trial" issue was not properly presented to the court below, and we wish to demonstrate the incorrectness of that claim.

### I. SEARCH AND SEIZURE

#### A. *The Proper Standard: McDonald*

Our principal argument is that this Court should adopt, as the test of "reasonableness" for all searches without a warrant, the standard enunciated in *McDonald* v. *United States,* 335 U.S. 451, 455 (1948): that a search without a warrant is unreasonable unless "the exigencies of the situation" preclude the delay necessary to obtain a warrant.

Respondent (brief, p. 6) characterizes *McDonald* as

a discredited decision espousing a discredited doctrine. *McDonald* cannot be so lightly brushed away. While, to be sure, *McDonald* was impliedly overruled in *Rabinowitz*,[1] 339 U.S. 56 (1950), it has enjoyed a better fate in recent years. *McDonald* has been cited by this court in support of the invalidation of warrantless searches in several post-*Rabinowitz* decisions. *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951); *Jones* v. *United States*, 357 U.S. 493, 498 (1958); *Silverman* v. *United States*, 365 U.S. 505, 511 (1961). In *Regaldo* v. *California*, 374 U.S. 497 (1963), the Court remanded a case to a state court "for further consideration in light of . . . *McDonald*"—hardly the fate of a discredited doctrine.[2] See also *Warden v. Hayden*, 387 U.S. 294, 298 (1967); *Katz* v. *United States*, 36 U.S. L. Week 4080, 4082 n. 19 (Dec. 18, 1967).

Respondent's lengthy explanation (Resp. brief, pp. 9-16) of why the search in the present case was "reasonable" re-

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[1] *Rabinowitz*, 339 U.S. at 66, expressly overruled *Trupiano* v. *United States*, 334 U.S. 699 (1948). *Trupiano*, which was decided a few months before *McDonald*, was one of a series of cases enunciating the same doctrine as was expressed in *McDonald* (see the cases cited in our opening brief, pp. 14-15). In rejecting the doctrine, *Rabinowitz* impliedly overruled all of these decisions. Mr. Justice *Frankfurter* so noted in his dissent in *Rabinowitz*, 339 U.S. at 85.

Ironically, *Trupiano* was probably incorrectly decided even under its own doctrine. The items seized in *Trupiano* were in open view at the time of arrest and, as Mr. Justice Frankfurter explained in his dissent in *Rabinowitz*, there is no Fourth Amendment protection for items in open view (339 U.S. at 75). It was this ironic factor which led us to adopt *McDonald*, rather than *Trupiano*, as the representative of the doctrine we espouse. We were not motivated, as respondent suggests (brief, p. 6), by a desire to conceal *Rabinowitz*' purported overruling of the doctrine. On the contrary our opening brief (p. 16) acknowledged that *Rabinowitz* purported to do so.

[2] *Regaldo* was decided one week after *Ker* v. *California*, 374 U.S. 23 (1963), in which this Court announced that federal standards govern the reasonableness of searches by State officers. *Regaldo* was thus remanded for reevaluation in light of the federal standards. Apart from *Ker*, the only case cited as representative of those federal standards was *McDonald*.

inforces, we believe, the need for a standard of simple, uniform application. Plainly, if reasonableness turns on the fine lines and distinctions proffered by respondent, warrantless searches will continue to be conducted in a veritable wilderness, with no one certain, until the case reaches this Court, whether the search was lawful. A district judge, confronted with the task of distinguishing *Preston*[3] from *Cooper*,[4] recently lamented "this complex area of search and seizure, where hairline distinctions at times seem to govern to the dismay of many." *United States* v. *Kuntz*, 265 F. Supp. 543, 544 (N. D. N. Y. 1967). For evidence that the courts of appeals are finding the task no easier, *cf. Weaver* v. *Lane*, 382 F. 2d 251 (7th Cir. 1967) (validating search) *with ibid*, at p. 255 (dissenting opinion of Chief Judge Hastings) and *Williams* v. *United States*, 382 F. 2d 48 (5th Cir. 1967) (invalidating search).

**B. *Applying McDonald to the Facts of This Case.***

In an effort to bring this case within the *McDonald* rule, respondent argues that there *were* practical considerations precluding the delay necessary to obtain a warrant (Resp. brief, p. 13):

> "In the present case, the car at the time of the search was parked outside the jail where any member of the public could come . . . [T]here was a risk in the present case that objects in the car, or even the car itself, might be removed by other confederates of the defendants, or by curious passers-by, or by those intending to steal an automobile parked in the open or to steal objects therefrom."

These "risks" have never justified foregoing a warrant. As this Court has so often recognized, the police need only

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[3] *Preston* v. *United States*, 374 U.S. 364 (1964).
[4] *Cooper* v. *California*, 386 U.S. 58 (1967).

have kept the car under surveillance while the warrant was being obtained—hardly an imposition, as the car was parked right outside the jail. See, e.g. *Taylor* v. *United States,* 286 U.S. 1, 6 (1932) ("a short period of watching would have prevented any such possibility"); *United States* v. *Jeffers,* 342 U.S. 48, 52 (1951) ("the officers admit they could have easily prevented any such destruction or removal by merely guarding the door"); *Chapman* v. *United States,* 365 U.S. 610, 613-16 (1961).

**C. *If McDonald Is Not the Governing Standard.***

If this Court does not adopt McDonald as the uniform standard applicable to all searches without a warrant, the question becomes whether "in the facts and circumstances" of this case the search was "reasonable." *Rabinowitz, supra.* We showed in our opening brief (pp. 27-31) that the decision in *Preston* dictates that a search conducted without a warrant in the circumstances of this case is not "reasonable." Respondent assails our view so vigorously, however, and with such imaginative distortion of the record and the precedents, that further discussion is required.

**1. Respondent's Interpretation of *Cooper*.**

Fundamental to respondent's contentions is its proffered interpretation of *Cooper* v. *California,* 386 U.S. 58 (1967), which appears at page 12 of its brief:

> "[T]he decision in *Cooper* can only be explained in one of two ways. First, the time and place requirements incident to an arrest have been expanded or abrogated. The second explanation is that the Court now recognizes the principle that an automobile may be searched without a warrant at any time when it is validly held as evidence in a case."

We think it clear that *Cooper* stands for neither of these propositions. Rather, the factor which distinguished *Cooper* from *Preston* was that police officers were required by state

law to seize the car and to hold it for forfeiture proceedings (386 U.S. at 61-62):

> "This case is neither *Preston* nor controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car,—whether the State had 'legal title' to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it . . . Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding."

Thus *Cooper* does not stand for the propositions attributed to it by respondent.[5] Nor should this Court now adopt these

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[5] In fairness to respondent, however, we should note that many lower courts have read *Cooper* even more expansively, in effect to authorize searches of automobiles any time, any place, following an arrest of the driver. Some of these cases have asserted that *Cooper* overruled *Preston*. *People* v. *Webb*, 56 Cal. Rep. 902, 424 P. 2d 342 (1967); *ibid*, 424 P. 2d 356 (concurring opinion); *Stewart* v. *People*, 426 P. 2d 545 (Colo. Sup. Ct. 1967); *State v. Houchin*, 428 P. 2d 971 (Mont. Sup. Ct. 1967); *Abrams* v. *State*, 223 Ga. 216, 154 S.E. 2d 443 (1967); *State* v. *Omo*, 199 Kan. 167, 428 P. 2d 768 (1967); *State* v. *Boykins*, 50 N. J. 73, 232 A. 2d 141 (1967); *Draper* v. *Maryland*, 265 F. Supp. 718 (D. Md. 1967); *Davidson* v. *Boles*, 266 F. Supp. 645 (N. D. W. Va. 1967). *Contra: State* v. *Johnson*, 427 P. 2d 705 (Wash. Sup. Ct. 1967); *Williams* v. *United States*, 382 F. 2d 48 (5th Cir. 1967); *Weaver* v. *Lane*, 382 F. 2d 251, 255 (7th Cir. 1967) (dissenting opinion).

propositions and expand further the areas in which warrantless searches are permitted. As this Court said so recently in *Katz, supra,* while rejecting a different proposal for expansion:

> "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers,* 342 U.S. 48, 51, and that *searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment*—subject only to a few *specifically established* and *well-delineated* exceptions." (36 U.S. .L Week 4080, 4082, emphasis added).

Moreover, as we now show, even the expansion sought by respondent would not validate the search in the facts and circumstances of this case. Respondent advances three bases for sustaining the search. We deal with each in turn.

**2 The Bases Advanced by Respondent to Justify the Search.**

a. *The search as incident to an "arrest" which could have been made for the shooting.* Respondent repeatedly suggests that Sheriff Powers, when he decided to chase and stop petitioners' car, had a detailed description of the car involved in the shooting and recognized petitioners' car as fitting that description (Resp. brief, pp. 3-4, 10; 14, 16). This is contrary to Sheriff Powers' testimony (J.A. 27):

> "Q. (By Mr. Carter) Did you get a description of the automobile [involved in the shooting]?
>
> "A. Not exactly. All I got is just that it would be an old make model car. Kinda old make model car."

Thus, when he stopped petitioners' car, Sheriff Powers knew only that it, like the shooters' car, was an old make; that it was speeding; and that it was coming from the direction of—albeit several miles away from—the shooting.

Clearly, this did not constitute "probable cause" to believe that petitioners were involved in the shooting.[6] Indeed, it is obvious that Sheriff Powers did not believe he had such probable cause, for he did not arrest them for the shooting. Thus respondent's repeated contention (brief pp. 8, 14, 15, 16) that the search could be justified as incident to an arrest for the shooting—an arrest which never was made—is plainly untenable. Significantly, the court below did not rely on any such theory in upholding the search (J.A. 45). Respondent insists that: "The charge in the present case was reckless driving, but in reality the reason which induced their apprehension was an honest belief based upon probable cause that they had been guilty of shooting into a house in Monroe County" (Resp. brief, p. 15). Plainly, if Sheriff Powers had had "an honest belief based upon probably cause" that petitioners had been involved in the shooting, he would have arrested them for that crime. It probably *is* true, however, as respondent suggests, that the reckless driving arrest was merely a pretext to get petitioners and the car to the station house. Undoubtedly, Sheriff Powers wanted to search the car in the hope that he would find sufficient evidence to justify an arrest for the shooting. It is well settled, however, that searches may not be conducted without warrant, simply because there is a probability that incriminating evidence will be found. As this Court said so recently in *Katz* v. *United States,* 36 U.S. L. Week 4080, 4082 (Dec. 18, 1967), "this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end."

Finally, even if a search would have been justified at the

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[6] After the car was stopped, Sheriff Powers observed a fresh bullet hole in the back (J.A. 29) but he had received no report that the car from which shots were fired had received a return volley, and thus had no basis at that time for relating the bullet hole to the shooting.

time the car was stopped on the theory asserted by respondent, that would not justify the later search at the police station. *Preston,* 376 U.S. 367-68:

> "Here, we may assume, as the Government urges, that, either because the arrests were valid or because the police had probable cause to think the car stolen, the police had the right to search the car when they first came on the scene. *But this does not decide the question of the reasonableness of a search at a later time and at another place.*" (Emphasis added.)

b. *The search as incident to an arrest at the jail.* In an effort to make the search more proximate to the arrest, respondent argues (brief, p. 11) that petitioners were not arrested until they arrived at the jail. This contention, too, will not survive analysis.

Sheriff Powers testified that after stopping the car, he "advised" petitioners that he "was going to take them on to the jail" (J.A. 40). While petitioners were not told until they arrived at the jail what the *ground* for arrest was (i.e. reckless driving), they were under arrest from the moment they were "advised" (not *asked*) that they were being taken to the jail. *Henry* v. *United States,* 361 U.S. 98, 103 (1959). Cf. *Rios* v. *United States,* 364 U.S. 253, 261-62 (1960). The police cannot validate a search "at a later time and at another place" (*Preston, supra*) by the expedient of "re-arresting" the person when ready to begin the search.

Moreover, even if the reckless driving arrest were deemed to have taken place at the jail, this would not justify searching the car as "incident" to that arrest. Such searches are permitted only "in order to find and seize things connected with the crime as its fruits, or as the means by which it was committed, as well as weapons and other things to effect an escape from custody", *Agnello* v. *United States,* 269 U.S. 20, 30 (1925). But "there are no fruits of speeding", *United*

*States* v. *Tate*, 209 F. Supp. 762, 763, 765 (D. Del. 1962), *cf. Preston*, 376 U.S. at 368, and that, in essence, is all that petitioners were arrested for. Nor could there have been, within the car, evidence of the crime for which petitioners were arrested. And, clearly, the police could not have feared that petitioners might utilize weapons within the car to effect an escape, for petitioners were under detention within the jail.

In addition, this Court has never held that the scope of an incidental arrest can extend beyond the premises within which the arrest was made. Thus, even if the police could search the jail, as the place in which the arrest occurred, they could not go outside and search the car as incidental to the arrest.

c. *The search justified because the car was evidence.* Finally, respondent argues (pp. 13-15) that the car was "evidence" of the shooting, and that under *Cooper* the police may search any car being held as evidence of a crime. The facts will not support this theory, however. Petitioners were under arrest solely for reckless driving. The car was not evidence of that crime. At its broadest, *Cooper* authorized only the search of cars held as evidence of "the crime for which they arrested petitioners" (386 U.S. at 61), and *Preston* was expressly distinguished on the ground that "the fact that the police had custody of Preston's car was totally unrelated to the vagrancy charge for which they arrested him" (*ibid*). Indeed, there is no evidence here that the police were holding the car as "evidence" of anything, or even that they were holding it at all.[7] The record shows only that, petitioners having been taken to the jail in a police car, the police arranged to have the car towed to the jail. We think the most probable explanation is that the car was taken to the jail so that the police could conduct an

[7] Petitioners were never criminally tried for the shooting, and even in this contempt case the car was not introduced as "evidence."

exploratory search, in the hope that evidence would be uncovered linking petitioners to the shooting. As we have already shown, that is the classic situation in which a search without warrant is forbidden.

## II. JURY TRIAL: THE ISSUE WAS PROPERLY RAISED BELOW

Respondent's contention (pp. 16-24) that the jury trial issue was not properly raised below is preposterous.

Rule 15 of the Supreme Court of Tennessee requires an appellant to file "assignments of error" which must be accompanied by "a brief, which shall state concisely and specifically the propositions of law . . . without argument or elaboration, relied upon by the appellant . . . There must follow each proposition of law a citation of the authorities relied upon to sustain it."

In accordance with these requirements, appellants (petitioners here) filed as one of their assignments of error that "the Court erred in denying the defendants a trial by jury" (J.A. 39), and in the accompanying brief[8] they stated the first proposition of law as follows (J.A. 40):

[8] The assignments of error and the brief were actually combined in a single document, as authorized by Rule 15(1) of the court below.

"PROPOSITION OF LAW I

"In cases of contempt of court committed outside the presence of the court there is a constitutional and statutory right to trial by jury.

"Tennessee Code Ann., ch. 21, § 1011.

"Tennessee Constitution, Art 1, § 6.

*"U.S. Constitution, Amendment VI.*

*"U.S. Constitution, Amendment XIV."* (Emphasis added.)

Appellants thus did precisely what the Rules of the Tennessee Supreme Court require, and the Sixth and Fourteenth Amendments were cited precisely where they should have been: in the Propositions of Law. That the court below fully understood the issue, and passed upon it, is evident from its citation of and reliance upon *Cheff* v. *Schnackenburg*, 384 U.S. 383 (1966), the most current decision of this Court discussing whether the Sixth Amendment creates a right to jury trial in criminal contempt proceedings (J.A. 44). The decision below expresses no dissatisfaction with the manner in which the issue was raised and presented.

Respondent's complaints are wide of the mark. It contends (pp. 21-22) that the Sixth Amendment should have been cited in the assignments of error, rather than the accompanying propositions of law. But the rules of the court below do not provide for citations of authority in the assignment of error; rather, Rule 15 provides that such citations must appear in the propositions of law.

Respondent next insists (pp. 22-23) that merely citing the Sixth Amendment in the propositions of law was insufficient; it should have been elaborated upon at length. But Rule 15, quoted above, provides precisely to the contrary. Briefs are to be "without argument or elaboration."

The jury trial issue was properly presented to the court below, was passed upon on the merits, and is properly here.

Respectfully submitted,

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